

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 29, 2007 Session

DARRYL JONES v. STATE OF TENNESSEE

Appeal from the Claims Commission for the State of Tennessee
No. 20401093 Stephanie R. Reeves, Claims Commissioner

No. M2006-02299-COA-R3-CV - Filed on July 25, 2007

Darryl Jones (“Claimant”) was injured while being transported from prison to a court hearing. Claimant filed a negligence action against the State of Tennessee (the “State”) for his personal injuries. After the case had been pending for almost two years, the State filed a motion to dismiss for failure to prosecute pursuant to Tenn. Code Ann. § 9-8-402(b). The State claimed that, for a one year period, no activity had occurred to advance the case to disposition and the applicable statute mandated dismissal. After Claimant failed to respond to the motion to dismiss, the Claims Commission granted the motion. Claimant thereafter filed a motion for relief from the judgment pursuant to Tenn. R. Civ. P. 60.02, which was denied. Claimant appeals the denial of his Rule 60.02 motion. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Claims Commission Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Henry R. Allison, III, Nashville, Tennessee, for the Appellant, Darryl Jones.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Jennifer L. Brenner, Nashville, Tennessee, for the Appellee, State of Tennessee.

OPINION

Background

This is a personal injury action filed by Claimant against the State. On January 3, 2003, Claimant was incarcerated at the Middle Tennessee Correctional Complex. Claimant was being transported in a van to a court hearing in Williamson County. According to the complaint:

Claimant was handcuffed and shackled. Claimant was not secured by a seatbelt. Claimant was seated in the second row side of the van. As the van began pulling through the Sallyport, the Sallyport operator did not see the van and closed the Sallyport door striking the van on the right rear side. The collision caused Claimant to be thrown against the steel cage inside of the van striking the right side of his head, face and neck. He was then thrown back to the left by the impact and struck his head, neck and back between the seat in front of him and the seat in which he was sitting. Claimant had no way to secure himself from the impact or being thrown around because he was handcuffed and shackled without a seatbelt.

Claimant avers there were inmates in the Sallyport waiting to exit when the van approached the Sallyport. Claimant avers that Driver McIntyre was negligent in not waiting until the Sallyport door closed and the inmates waiting inside had exited and the Sallyport reopened before entering the Sallyport. Claimant avers that according to McIntyre's own statement ... the Sallyport operator did not see the van and they were only halfway through the Sallyport when the gate began to close so McIntyre sped up the van in an attempt to avoid the collision.

Claimant further avers that the Sallyport operator was negligent in not keeping a proper lookout at the Sallyport door for obstacles, prisoners, or vehicles before closing the Sallyport....

Claimant sought compensatory damages in the amount of \$105,532.50 for "bodily injury, medical expenses, permanent partial disability, diminished wage earning capacity, pain and suffering and diminution in his ability to enjoy life and other related expenses." The complaint was filed with the Division of Claims Administration on January 2, 2004. The Division of Claims Administration transferred the claim to the Claims Commission on April 1, 2004.

On April 26, 2004, the State answered the complaint and admitted that an accident with the Sallyport had occurred. The State averred that it lacked sufficient knowledge either to admit or deny that Claimant was injured or the extent of his injuries.

The next document in the record on appeal is a Motion to Dismiss for Failure to Prosecute filed by the State on November 23, 2005. According to the State's motion:

Pursuant to Tenn. Code Ann. § 9-8-402(b), this claim should be dismissed for failure to prosecute. There has been no action taken by the claimant to advance this case to disposition for nearly two years from the date of filing with the Claims Commission. Defendant's discovery requests have not been answered. There has been no word from the claimant as to when any responses would [be] made, or if the claimant intends to take any action at all in pursuit of this claim....

In the instant case, the State filed its Answer to the Complaint on April 26, 2004. The Claims Commissioner wrote a letter on May 3, 2004 reflecting that there had been a response to the Complaint, and that it was incumbent upon the claimant to take the initiative in prosecuting his claim. The letter also advised the claimant that under Tenn. Code Ann. § 9-8-402(b), any claim in which no action was taken by the claimant to advance it within any one-year period must be dismissed....

On January 6, 2006, an Order of Dismissal was entered. In the order, the Claims Commissioner noted that Claimant filed no response to the motion to dismiss. The order then states:

Defendant's motion and the Commissioner's file in this matter reflect that claimant has taken no action to advance this matter to disposition since the filing of the complaint....

Based upon the record in this matter, including the claimant's failure to respond to the instant motion or to defendant's discovery requests, the Commission concludes that dismissal of this matter is mandated by Tenn. Code Ann. § 9-8-402(b) for failure to take any action to advance the case to disposition in more than one year. The claim is therefore dismissed with prejudice.

On February 21, 2006, Claimant filed a motion to vacate the judgment pursuant to Tenn. R. Civ. P. 60.02. Attached to the motion was the affidavit of Claimant's attorney. According to this affidavit: (1) responses to the State's discovery requests were mailed on June 10, 2004; (2) in July of 2004, Claimant's attorney wrote a letter to the State's attorney advising that the Claimant still was incarcerated and would be unavailable for a deposition until he was released; (3) on September 28, 2004, Claimant's attorney wrote another letter to the State, this time advising that his client had been released from prison and was now available for a deposition; and (4) the next activity

occurred on November 10, 2004¹, when Claimant's attorney wrote a letter to the State's attorney "requesting that he contact my office." Then, according to the affidavit:

After November, 2005, due to my own illness, and the moving of my office, there was no contact by my office to the Assistant Attorney General's office. I do not have the specific date, however, my legal assistant ... contacted the Attorney General's Office and asked to speak to John Sinclair. She was informed that he was no longer assigned to this case and we would be contacted when the case was reassigned.

Claimant's attorney then stated that he heard nothing from the State until he received a copy of the motion to dismiss for failure to prosecute.

The State responded to the Claimant's Rule 60.02 motion. The State pointed out that the affidavit of Claimant's attorney acknowledged that no activity took place after November 10, 2004 and sometime prior to the end of "November, 2005" when a call was placed to the State's attorney. In addition, the State claimed:

[A]ttorney for the claimant insists that he did, indeed, attempt to communicate with the defendant after he filed a Complaint on January 2, 2004. Specifically, he attaches four letters to his Motion to Vacate, which he purportedly mailed to the Attorney General's Office. Curiously, none of the four letters were received in this office. As the undersigned previously stated in her Motion to Dismiss for Failure to Prosecute, there is not a single letter, pleading or other communication of any kind from the claimant in the file.²

On May 1, 2006, the Claims Commission entered an order denying Claimant's Rule 60.02 motion for relief from the judgment. The order states, in relevant part, as follows:

The Order of Dismissal granted the State's motion to dismiss, filed November 23, 2005, pursuant to Tenn. Code Ann. § 9-8-402(b) for failure to take action to advance the case to disposition within a one year period of time. Claimant did not respond to the motion.

Claimant now argues that the Order should be vacated on the ground of mistake, inadvertence or excusable neglect. In support of

¹ The affidavit states this letter was dated November 10, 2005. The date on the copy of the letter furnished by Claimant's attorney is actually November 10, 2004.

² As will be discussed in more depth later in this Opinion, the State did not file an affidavit substantiating its claim that none of these documents actually were received.

the motion, claimant relies upon the affidavit of counsel, counsel's legal assistant and counsel's legal secretary....

This matter was transferred to the Claims Commission on April 1, 2004. The State filed an answer to the complaint on April 26, 2004. On May 3, 2004, the Commission forwarded a letter to claimant's attorney, notifying him that the matter was at issue. The letter also advised claimant of the Claims Commission Rules, which could be obtained from the clerk's office or online, and of Tenn. Code Ann. § 9-8-402(b), mandating dismissal of any claim in which no action is taken by the claimant to advance the case to disposition within any one year period.

The State contends that it has never received an answer to its interrogatories and requests for production of documents, served April 26, 2004. On December 8, 2004, a letter was forwarded to claimant's counsel noting that the response was tardy and inquiring as to when a response might be received.

The claimant contends that a response to the State's discovery was served on June 10, 2004, and has filed a copy of an enclosure letter forwarded with the discovery. Claimant has also filed a copy of a verification page, which reflects that the response was signed by claimant on [June] 9, 2004....

Claimant contends that letters were sent to counsel for the State on July 14, 2004, September 28, 2004, and November 10, 2004, concerning scheduling the claimant's deposition. The State asserts that, like the discovery responses, it has no record of these letters having been received. Claimant contends that there was no further contact with the Attorney General's Office after November 2005, due to his counsel's illness and an office move.

After reviewing the pertinent facts, the Commission denied Claimant's Rule 60.02 motion, concluding as follows:

The Commission is sympathetic to the difficulties experienced by counsel and his staff. While those difficulties might excuse counsel's failure to respond to the motion to dismiss, they do not appear to be germane to the earlier failure to take action to move the case to disposition within a one year period of time.

Tenn. Code Ann. § 9-8-402(b) mandates that any claim upon which no action is taken by the Claimant to advance the case to disposition within any one year period of time be dismissed with prejudice. Because the claimant has not demonstrated such action during the period between November 11, 2004, and December of 2005, the Commission finds that the motion to set aside the Order of Dismissal in this matter should be denied.

Claimant appeals, raising only the one issue that the Commission erred when it refused to grant his Tenn. R. Civ. P. 60.02 motion for relief from the judgment of dismissal.

Discussion

The applicable standard for reviewing the denial of a Tenn. R. Civ. P. 60.02 motion is set forth in *Henry v. Goins*, 104 S.W.3d 475 (Tenn. 2003):

In reviewing a trial court's decision to grant or deny relief pursuant to Rule 60.02, we give great deference to the trial court. *See Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). Consequently, we will not set aside the trial court's ruling unless the trial court has abused its discretion. *See id.* An abuse of discretion is found only when a trial court has "'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Goins, 104 S.W.3d at 479. The *Goins* Court also noted that the Tenn. R. Civ. P. 60.02 "escape valve" should not easily be opened, but is to be used to protect parties "from possible inequity that might otherwise arise from the unrelenting imposition of finality imbedded in our procedural rules." *Id.* at 482 (quoting *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991)).

Tenn. R. Civ. P. 60.02 provides, in relevant part, as follows:

Rule 60.02. Mistakes – Inadvertence – Excusable Neglect – Fraud, etc. – On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or

other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

The State's motion to dismiss was filed pursuant to Tenn. Code Ann. § 9-8-402(b) (Supp. 2006) which provides, *inter alia*:

Absent prior written consent of the commission, it is mandatory that any claim filed with the claims commission upon which no action is taken by the claimant to advance the case to disposition within any one-year period of time be dismissed with prejudice.

According to the plain and very specific language of the statute, dismissal is mandated if no action is taken to advance a claim within any one year time period. As set forth above, Claimant's attorney filed his affidavit setting forth what he claims to have done to advance his client's claim. The State, on the other hand, asserts that none of the letters or discovery responses were received and disputes whether any action ever was taken after the complaint was filed. However, no affidavit was filed by the State which specifically provides that none of these letters or discovery responses ever were received. We note that the State reassigned this case to a different attorney while this case was pending and perhaps the previous attorney was unavailable to provide an affidavit. Regardless of why this information never was set forth in an affidavit, there is no such affidavit from the State, and we, therefore, will proceed under the assumption that Claimant's attorney did in fact send the letters and discovery responses on the dates set forth in his affidavit.

Assuming all of the factual allegations in Claimant's attorney's affidavit are true, the most that can be said concerning the relevant one year period is that Claimant's attorney's legal assistant made a phone call to the State's attorney at some point between November 11, 2004, and November 30, 2005. Thus, there may or may not have been any activity during the relevant one year period, depending on when that phone call was placed. Because we do not know the exact date the phone call was made and because it could have been made after November 10, 2005, there is no assurance that any activity took place between November 11, 2004, and November 10, 2005.

Claimant has the burden of establishing that he is entitled to Tenn. R. Civ. P. 60.02 relief. *Goins*, 104 S.W.3d at 479. Because Claimant failed to establish that some action to advance his case to disposition definitely took place between November 11, 2004 and November 10, 2005, we are unable to conclude that the Commission's denial of the Rule 60.02 motion was an abuse of

discretion, especially when considering the General Assembly's unambiguous directive contained in Tenn. Code Ann. § 9-8-402(b).³

Conclusion

The judgment of the Claims Commission is affirmed. This case is remanded to the Claims Commission for collection of the costs below. Costs on appeal are taxed to the Appellant, Darryl Jones, and his surety.

D. MICHAEL SWINEY, JUDGE

³ We express no opinion on whether the phone call made by the legal assistant would have constituted sufficient "action" for purposes of Tenn. Code Ann. § 9-8-402(b) if Claimant had proven that phone call definitely took place during the relevant one year period.